

CALIFORNIA COASTAL COMMISSION

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Staff: MV-LB
Staff Report: 1/27/05
Hearing Date: 2/16-18/05
Commission Action:

STAFF REPORT: REVISED FINDINGS**DISPUTE RESOLUTION**

NUMBER: 5-04-249-EDD

LOCAL CDP NO.: 02-12

LOCAL JURISDICTION: City of Huntington Beach

APPLICANT FOR LOCAL PERMIT: Makallon Atlanta Huntington Beach, LLC

PROJECT NAME & LOCATION: Pacific City
21002 Pacific Coast Highway
City of Huntington Beach, Orange County

DESCRIPTION: Revised findings in support of the Commission's decision that the City of Huntington Beach's approval of local Coastal Development Permit No. 02-12 is not appealable. The project involves subdivision of a 31-acre site and development of a mixed-use project consisting of retail, office, restaurant, cultural, and entertainment uses (191,100 sq. ft.); a 400 room, eight-story hotel with spa and health club; 516 condominium units above subterranean parking; a 2.0-acre open space/park and public easement corridor; extension of Pacific Avenue; and associated infrastructure.

DATE OF COMMISSION ACTION: July 15, 2004

COMMISSIONERS ON PREVAILING SIDE: Commissioners Burke, Iseman, Kram, Neely, Peters, Potter, and Chairman Reilly.

SUMMARY OF STAFF RECOMMENDATION:

Staff recommends that the Commission adopt the following revised findings in support of the Commission's action of July 15, 2004, in which the Commission found that the City's approval of local coastal development permit 02-12 was not an action appealable to the Coastal Commission. The question of whether the local government action was appealable turned on four potential bases for appeal, pursuant to Section 30603(a) of the Coastal Act. The four potential bases for appealability raised at the hearing were: 1) whether the site is located between the first public road and the sea; 2) whether the site is within 100 feet of wetlands; 3) whether a portion of the project constitutes a major public works project; and, 4) whether the site is within 300 feet of a sandy beach. However, after a public hearing on the matter, the Commission found that the project did not qualify as appealable under any of the bases raised.

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I. MOTION AND RESOLUTION:

MOTION: *I move that the Commission adopt the revised findings in support of the Commission's action on July 15, 2004 concerning Dispute Resolution No. 5-04-249-EDD.*

STAFF RECOMMENDATION OF APPROVAL:

Staff recommends a **YES** vote on the motion. Passage of this motion will result in the adoption of revised findings as set forth in this staff report. The motion requires a majority vote of the members from the prevailing side present at the July 15, 2004 hearing, with at least three of the prevailing members voting. Only those Commissioners on the prevailing side of the Commission's action are eligible to vote on the revised findings.

Commissioners Eligible to Vote: Burke, Iseman, Kram, Neely, Peters, Potter, and Reilly.

RESOLUTION TO ADOPT REVISED FINDINGS:

The Commission hereby adopts the findings set forth below on its determination that Coastal Development Permit 02-12 approved by the City of Huntington Beach is not appealable on the ground that the findings support the Commission's decision made on July 15, 2004 and accurately reflect the reasons for it.

STAFF NOTE:

These revised findings are solely intended to reflect the action taken by the Commission on July 15, 2004 and the reasons for that action, and are therefore limited to describing the rationale for the action and to the specific issues raised at the hearing. Comments from the public concerning the findings will be limited to discussion of whether the findings reflect the action of the Commission.

II. FINDINGS AND DECLARATIONS:

The Commission hereby finds and declares:

A. BACKGROUND ON CITY ACTION

On June 7, 2004 the Huntington Beach City Council conditionally approved local coastal development permit No. 02-12. On June 21, 2004, the Commission received in its South Coast District office notification that the City of Huntington Beach had taken a final action to approve local coastal development permit No. 02-12 with special conditions (Exhibit 3). The City's action authorizes Makallon Atlanta Huntington Beach, LLC, to subdivide a 31-

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acre site and develop a mixed-use project consisting of retail, office, restaurant, cultural, and entertainment uses (191,100 sq. ft.); a 400 room, eight-story hotel with spa and health club; 516 condominium units above subterranean parking; a 2.0-acre open space/park and public easement corridor; extension of Pacific Avenue; and associated infrastructure. The 31-acre property is located at 21002 Pacific Coast Highway, City of Huntington Beach, Orange County (Exhibit 1).

The notice of the City's approval indicated that the action was not an action appealable to the Coastal Commission. Questions were raised, both by Commission staff and by members of the general public, about the City's determination that the action on the local coastal development permit was not appealable. Section 30603(a) of the Coastal Act identifies the types of development that may be appealed to the Commission after a municipality's local coastal program has been certified by the Commission. The City's action was alleged to be appealable because the City-approved project allegedly included development that: 1) is located between the first public road and the sea; 2) is within 100 feet of wetlands; 3) constitutes a major public works project; and, 4) is within 300 feet of a sandy beach.

In order to secure a final determination on the appealability of the local government action, Commission staff scheduled the matter for Commission review at the July 15, 2004 public hearing. At that hearing, the Commission found that none of the alleged bases for appealability applied with respect to the City's approval.

B. APPEALABILITY DETERMINATION

Section 30603 of the Coastal Act provides the basis for appeal of locally issued coastal development permits to the Commission. That section provides, in part, that:

Section 30603

(a) After certification of its local coastal program, an action taken by a local government on a coastal development permit application may be appealed to the commission for only the following types of developments:

(1) Developments approved by the local government between the sea and the first public road paralleling the sea or within 300 feet of the inland extent of any beach or of the mean high tide line of the sea where there is no beach, whichever is the greater distance.

(2) Developments approved by the local government not included within paragraph (1) that are located on tidelands, submerged lands, public trust lands, within 100 feet of any wetland, estuary, or stream, within 300 feet of the top of the seaward face of any coastal bluff.

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(3) Developments approved by the local government not included within paragraph (1) or (2) that are located in a sensitive coastal resource area.

(4) Any development approved by a coastal county that ...

(5) Any development which constitutes a major public works project or a major energy facility.

The appealability of the City's action on local coastal development permit 02-12 was called into question on four separate grounds. These are each discussed below.

1. First Public Road

Pursuant to Section 30603(a)(1), developments approved by the local government that are located between the sea and the first public road paralleling the sea are appealable. In the project vicinity, Pacific Coast Highway is the "first road paralleling the sea." According to California Code of Regulations, Title 14 ("14 CCR"), Section 13577(i), when the boundary of the Commission's appeals jurisdiction is based on the "first public road," the area extends to the inland boundary of the right-of-way of that road.

Some allegations contended that Local Coastal Development Permit No. 02-12 authorized the elimination of public parking to accommodate the creation of a new traffic lane within the existing Pacific Coast Highway right-of-way, to serve traffic created by the approved development. The allegations contended that this work constitutes "development" as defined in Coastal Act Section 30106 and Section 245.04(J) of the City's Local Coastal Program and that since development is occurring within the right-of-way, the City's action approved development located "between the first public road and the sea" and, thus, would be appealable.

However, written and oral testimony was presented at the public hearing by Commission staff, and by the project applicant. While the work identified above is planned to occur, the testimony indicated that the highway widening was not part of the development authorized under City approved Coastal Development Permit 02-12. Rather, the highway widening is a Caltrans project that was previously approved by the Commission in the 1980s. Thus, there is no development authorized by City-approved Coastal Development Permit 02-12 located between the sea and the first public road paralleling the sea, and therefore the City-approved permit is not appealable under Section 30603(a)(1) of the Coastal Act on that ground.

2. Wetlands

Pursuant to Section 30603(a)(2), development approved by a local government that is located within 100 feet of a wetland is appealable. Allegations were made that wetlands are present on the subject site and that development authorized by City-approved Coastal Development Permit 02-12 is located within 100 feet of those wetlands.

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At the public hearing both oral and written testimony was presented by the City, the project applicant, and members of the general public. The testimony presented included both assertions that wetlands do exist on the site, as well as assertions that no wetlands exist on the site. In addition, evidence was submitted in written form prior to the hearing.

The environmental document used by the City to approve the project (EIR) concluded that no wetlands existed at the site. Among the information supporting the conclusions in the EIR were two biological surveys conducted at the subject site. These are dated February 28, 1998 and February 6, 2002 and both were prepared by BonTerra Consulting. In addition, the City recently obtained a limited field reconnaissance of the subject property that was conducted by P & D Consultants on July 14, 2004. All of these biological studies concluded there were no wetlands present on the site. The site was previously used for oil drilling, commercial and residential uses and has also been the subject of two recent, previous coastal development permits. In 1999 and 2000, coastal development permits were issued by the City and the Commission did not object to the City's determination of the appealability of the development identified in those approvals. Since that time, a remediation project has been on-going at the site pursuant to those previous authorizations. Finally, maps of sensitive habitat contained within the certified LCP, while not intended as a comprehensive catalog of the location and extent of all wetlands present within the City, do not identify this site as one containing wetlands.

Members of the public submitted photos and personal observations of wetland indicator species. These photos and statements, however, were not determinative of the presence of wetlands because they merely showed the possibility of the presence of certain indicator species at the site, which at the time was disturbed by soil remediation activities. The members of the public did not submit professional, quantitative surveys of the wetland indicator species they observed. Accordingly, although this evidence provided some indication of the existence of hydrophytic vegetation, there was no evidence presented regarding whether such vegetation predominated. Furthermore, the Commission's biological expert was not able to investigate the presence of wetlands at the site. Thus, no evidence submitted established the presence of wetlands pursuant to the Commission's definition.

The Commission reviewed all the evidence that was before it, and it concluded that, on balance, in this particular case, the evidence provided an insufficient basis for a determination that wetlands were present. Therefore, the Commission finds that the City-approved Coastal Development Permit 02-12 is not appealable under Section 30603(a)(2) of the Coastal Act.

3. Major Public Works Project

Pursuant to Section 30603(a)(5), development approved by a local government that constitutes a "major public works" project is appealable. Section 30114(b) of the Coastal Act defines "public works" to include all "public transportation facilities, including streets,

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roads, [and] highways,” and 14 CCR Section 13012 defines ‘major public works’ as follows:

(a) *"Major public works" and "Major energy facilities" mean facilities that cost more than one hundred thousand dollars (\$100,000) with an automatic annual increase in accordance with the Engineering News Record Construction Cost Index, except for those governed by the provisions of Public Resources Code Sections 30610, 30610.5, 30611 or 30624.*

(b) *Notwithstanding the criteria in (a), "major public works" also means publicly financed recreational facilities that serve, affect, or otherwise impact regional or statewide use of the coast by increasing or decreasing public recreational opportunities or facilities.*

Allegations were made that the widening of Pacific Coast Highway (and the associated removal of on-street public parking spaces) constitutes a “major public works” project. In this case, none of the provisions listed in subdivision (b) applies to that widening of Pacific Coast Highway. Moreover, as described previously, the highway widening is part of a Caltrans project previously approved by the Commission in the 1980s, and is not part of the City-approved development. Thus, the highway widening is not part of the development authorized under City approved Coastal Development Permit 02-12. Therefore, because the highway widening is not part of the City-approved Coastal Development Permit it does not provide grounds for appeal as a “major public works” project under Section 30603(a)(5) of the Coastal Act.

4. Distance of Approved Development from the Sandy Beach

Pursuant to Section 30603(a)(1) of the Coastal Act, development approved by a local government is appealable if the approved development is located within 300 feet of the inland extent of the sandy beach. In this case, there are a roadway, sidewalks, beach level bike path and a wide paved public parking lot between the development and the sandy beach. The *Post LCP Certification Permit and Appeal Jurisdiction, City of Huntington Beach* map adopted by the Commission on May 24, 1985 (herein “post-cert map”) indicates the private land within which the development is occurring is not within 300 feet of the inland extent of the sandy beach.

At the public hearing both oral and written testimony was presented by Commission staff, the project applicant, and members of the general public. The testimony presented included both assertions that the site was within 300 feet of the sandy beach and that it was not. However, the information and materials presented to the Commission prior to or at the time of its action, which asserted that some development was located within 300 feet of the sandy beach, did not compel the Commission to find that the City-approved coastal development permit authorized development located within 300 feet of the inland extent of the sandy beach. Rather, the Commission found more persuasive the testimony that its mapping staff, which has specific expertise in this area, had evaluated the situation and,

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consistent with the post-cert map, determined that the project site is more than 300 feet from the inland extent of the sandy beach. Thus, the Commission finds the development authorized by City-approved Coastal Development Permit 02-12 is located in an area that is not appealable under Section 30603(a)(1) of the Coastal Act.

C. CONCLUSION

Section 30603(a) of the Coastal Act describes the types of developments that may be appealed to the Coastal Commission after certification of a local government's Local Coastal Program. Questions were raised as to whether the development approved by the City under local Coastal Development Permit 02-12 was appealable based on four possible grounds. As described above, the Commission found that none of the possible bases for appeal are applicable to City-approved Coastal Development Permit 02-12.

Therefore, for all the reasons outlined above, the Commission finds that the City's approval of local Coastal Development Permit 02-12 is not a development appealable to the Coastal Commission.